In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4666

FRANK MILLER, ANTON BRONICH, and JOHN THOMAS,

Plaintiffs in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, JUDGE

Brief of Defendant in Error

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STATEMENT OF THE CASE

The evidence introduced on behalf of the government showed that agents, armed with a search warrant, went to certain premises in the City of Seattle occupied by and under the control of the

defendants; that while approaching the premises along the side street from the rear, the agents were easily able to detect a strong odor of fermenting mash, which emanated from the basement, as the basement door was open; that the defendant Miller was doing some carpenter work in the yard near the basement door; that as the agents approached the defendant, they could see through the open doorway in the basement, a number of empty raisin boxes, some boxes with raisins in them, part of a sack of sugar and a ten-gallon keg of wine partially covered with burlap, in accordance with the usual method used in wrapping kegs employed by bootleggers for their easier transportation; that the agents stopped and talked with defendant in the yard for a few moments, then served the search warrant upon him and entered the basement, where they found seven fifty-gallon vats or barrels containing approximately three hundred fifty (350) gallons of grape mash or wine in various stages of fermentation; also a number of kegs containing seventy-seven (77) gallons of finished wine, some of the kegs also being wrapped in burlap for transportation; that upon a search of a room upstairs, a bottle of moonshine whiskey was discovered; that

defendant Miller admitted that he occupied a small middle room on the third or top floor of the house; that defendant Bronich later admitted he was the owner of the premises, which was borne out by a deed and abstract found in his room, which were later returned to him by the prohibition agents; that defendant Thomas occupied the east room, as shown by clothing and letters found in that room, addressed to him at a soft drink parlor conducted by defendants Bronish and Thomas at another location; that defendant Miller stated he had been living in this house for about two weeks; that in support of a motion to suppress the evidence seized by the agents, each defendant made and filed an affidavit that he was living on the premises and that this wine was under his custody and possession, which affidavits were admitted as part of the government's case in chief; that none of the defendants took the stand but challenged the sufficiency of the evidence introduced by the government, rested their case and upon the evidence of the government, the jury returned a verdict of guilty.

ARGUMENT

The paintiff in error contend that this search and seizure was based entirely upon the search warrant theretofore issued by a United States Commissioner upon an affidavit which did not set forth facts sufficient to authorize the issuance of same; that they there were not evidentiary facts; and, further, that having entered the premises under a search warrant, the government's case must stand or fall with the search warrant even though there may have been a crime committed in their presence, and further that the mere manufacture of intoxicating liquor in a dwelling house could not be the basis of a search and seizure; and they also contend that the court erred in permitting the government to interrogate the notary public before whom affidavits were sworn to by each of the defendants in support of their motion to suppress, which affidavits had theretofore been filed in the court, upon the ground that the notary public happened to be the attorney for the defendants and that it was compelling the defendants to give testimony against themselves.

The government contends that the affidavit upon which the search warrant was issued was sufficient

in itself. The affidavit in the case of *Locknane vs. U. S.*, 2 Fed. 2nd, 427, passed upon by this court, stated no evidentiary facts in the opinion of this court, but in the present case the affidavit stated, in addition, the following:

"and that in addition thereto, affiant on said date and on previous occasions made an investigation of said premises and smelled the odor of intoxicating liquor and has seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor, all on the premises described as 139 27th Avenue North, Seattle, Washington."

The government agents, being familiar with the manner in which intoxicating liquor is being bartered and sold by bootleggers, the evidentiary facts set forth (Tr. 22) here were sufficient upon which to base a search warrant. The law is designed to protect against unreasonable searches only. It is not necessary to know exactly what any bottle or container might contain, in order to warrant an officer in believing in good faith that a crime is being committed. If so, an officer would necessarily be compelled to have the contents of any package or bottle analyzed by a competent expert, in order to tell whether or not the law is being violated, before he could make a sufficient affidavit

for a search or an arrest. The agents testified that agents had made an investigation of the premises and had smelled the odor of intoxicating liquor, which they later found in the house.

As to the *Murby* case cited by counsel, *Murby vs. U. S.* 293 Fed. 849, it is the contention of the government that the various reasons upon which it was decided are not in line with the weight of authority and most certainly not with cases heretofore decided by this court.

But regardless of the sufficiency of the search warrant, the government earnestly contends that under the facts of this case, no search warrant was necessary and whether or not it was sufficient became immaterial; that a crime was being committed in the presence of the officers and that they had a right—it was their *duty*—to arrest the defendant Miller and search the premises for all evidence of law violation; that they would have been derelict in their duty had they failed to do so.

There they were, standing on the premises, smelled a strong odor of fermenting liquor, found one of the defendants actually present and in charge of the same, saw at least one keg of the liquor and various materials ordinarily employed in the manufacture of intoxicating liquor. To say

that the officers must stand by, in the presence of the defendant, look upon the liquor and not be able to either seize the liquor or make an arrest would render prohibition enforcement farcical and reduce the law to an absurdity.

Who can say that having discovered the defendant in charge of the premises, the liquor in the process of manufacture, that the defendant was not then and there in the act of committing an offense in the presence of the officers? As was said by Judge Bledsoe, in *U. S. vs. Vatune*, 292 Fed. 497, at page 500:

"In considering the question of such good faith, it ought also to be specially kept in mind that all officers are presumed to be engaged only in the proper performance of their duty, and that the exception to the rule, so to speak, should be specially pointed out. All reasonable intendments should be indulged in, in support of the propriety of official action, and all proper encouragement given to those actually engaged, not infrequently at the peril of their lives, in the attempted protection of society from those who would despoil or destroy it.

"In other words, in the practical and intelligent effort to enforce the law in the face of the violations thereof, made possible by modern conditions, modern instrumentalities, and modern devices, we will dismally fail in our duty to protect society, if we fail to make adequate and effective use of

all the machinery available under the law. This does not mean that individual rights, guaranteed under the Constitution or otherwise, are to be disregarded; but it does mean, to me, at least, that positive encouragement, arising out of a lax regard for the rights of organized society, is not to be accorded to those who would subvert the law and ultimately effect the destruction of the government.

"Having probable cause to subject the person to immediate apprehension and detention, the officer possesses ample authority—in fact, it is his duty—to take into *custodia legis* the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. Thatcher vs. Weeks, 79 Me. 547, 11 Atl. 599; Spalding vs. Preston, 21 Vt. 9, 50 Am. Dec. 68; Getchell vs. Page, 103 Me. 387, 69 Atl. 624, 18 L. R. A. (N. S.) 253, 125 A. M. St. Rep. 30. To make effective the performance of this duty, it is, of course, necessary and permissible that the officer search the person of the accused and all articles or instrumentalities in his immediate possession."

Having lawfully gained admission upon the premises, the government is entitled to introduce evidence showing connection of the various defendants with the violation of the law there discovered.

The cases cited by the plaintiff in error, in support of their fourth point, are not decisive of this case; *Temperani vs. U. S.*, 299 Fed. 365, 9 C. C. A.

In answer to the fifth point raised by plaintiffs in error, we can see nothing in the case cited by them to sustain their position here. All of the motions and affidavits of the defendants had been voluntarily filed by them in the District Court and were matters of public record; the defendants themselves were not called to the stand and because the notary public who took their acknowledgment happened to be their attorney, did not change their affidavit to a privileged communication and excuse him from testifying as to their signatures. As a matter of fact, practically all of the contentions set forth in these affidavits had been testified to by government agents, namely as to the occupancy of the premises, letters found in the rooms of the premises addressed to the various defendants and as to the ownership of the liquor, as well as defendant Miller's own admissions to the officers. So it is difficult to see how the defendants were prejudiced in any manner by the introduction of these affidavits, even though the court should find that they were inadmissible (to which the government, of course, does not consent). If the defendants elected to file these affidavits, they cannot complain if they are used against them.

In support of the government's contention that a crime was being committed in the presence of the

officers and that evidence of ownership of the premises or connection with an illegal enterprise can be shown by various documents found after a lawful search, the government cites the following cases:

Goodfriend vs. U. S., 294 Fed. 148, 9 C. C. A. (Par. 5).

Vachina vs. U. S., 283 Fed. 35, 9 C. C. A.

Bachenberg vs. U. S., 283 Fed. 37, 9 C. C. A.

Katheriner vs. U. S., 276 Fed. 808, 9 C. C. A.

Lambert vs. U. S., 282 Fed. 413, 9 C. C. A.

Hurley vs. U. S., 300 Fed. 75, 1 C. C. A.

McBride vs. U. S., 284 Fed. 416, 5 C. C. A.

Garske vs. U. S., 1 Fed. 2nd, 620, 8 C. C. A.

Sayers vs. U. S., 2 Fed. 2nd, 146, 9 C. C. A.

Forni vs. U. S., 3 Fed. 355, 9 C. C. A.

Temporani vs. U. S., 299 Fed. 365, 9 C. C. A.

Respectfully submitted,

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